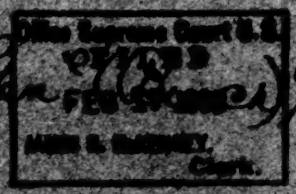
No. 218.

Br. of Atty. Gen. for P. E.



Filed Feb. 17, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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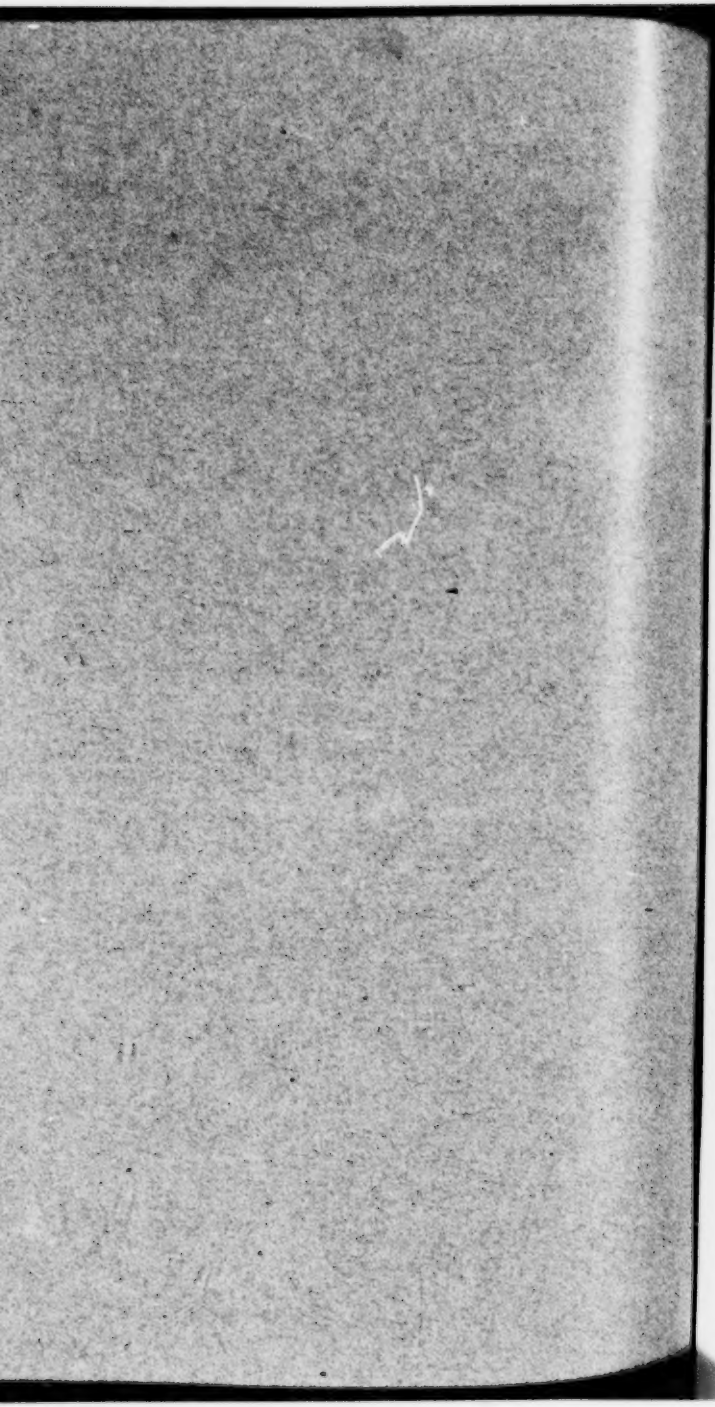

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HISTORY OF THE CASE.

This case was originally commenced in one of the United States district courts of Arizona, against the present defendant and one Daniel D. Ross, for cutting and removing from plaintiff's land in Arizona 5,905,500 feet of timber, of the value of $183,070.50. Before the final trial Ross died and the case was continued as against defendant company.

The cutting and removing of the timber by Ross was admitted, and also the value, as charged, and it was shown as well as practically settled beyond controversy that Ross sold it at Bisbee, Ariz., to the defendant company, who used it for mining purposes in said Territory.

It appeared that defendant did not cut and remove any portion of the timber.

The defendant was at the time and is now a corporation organized under the laws of the State of New York, but conducting mining operations in Arizona.

The defendant claimed that Ross had license to cut and remove the timber sued for by plaintiff, and that such license arose under the authority of the act of Congress of June 3, 1878 (20 St. L., 88). The section of the act in question reads as follows:

> That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes. * * *

On the trial of the cause in the district court evidence was introduced upon the part of the plaintiff to show that the land from which the timber was cut was

unsurveyed territory in and about Rock Creek Valley of Chiricahua Mountains, in the Territory of Arizona. Evidence was sought to be introduced as to the amount and value of the timber cut, whereupon it was expressly admitted by defendant's attorneys that said Ross cut and removed the timber and that it was purchased by the defendant company from him, substantially as alleged by plaintiff, and that it was of the value hereinbefore stated.

The defendant then introduced testimony tending to show that the lands from which the timber was cut were mineral, and therefore of such a character as to come within the terms of the statute above quoted.

No evidence was introduced having a tendency to show that said Ross was a citizen of the United States; nor was there any evidence tending to show that he was a bona fide resident of the Territory of Arizona; nor was there any evidence tending to show his residence at the time of the cutting and removal of such timber, except that contained in his deposition taken while he was still living and a defendant on a former trial, and read in evidence upon this trial by reason of his decease. This deposition will later on be set forth for the purposes of the argument.

Much evidence was introduced by the plaintiff in rebuttal tending to show that the lands in question were *not mineral lands* within the meaning of the said act of Congress. There was no controversy as to whether the regulations of the Secretary of the Interior relative to the protection of timber and undergrowth had been violated.

Upon the completion of the testimony in the case a motion was made by the attorneys for the United States that under the evidence in the case the jury should be instructed to find a verdict for the plaintiff for the amount claimed and admitted, which motion was denied by the trial court.

Various requests were made upon both sides for instructions to the jury, a portion of which were refused by the court.

The jury found a verdict for the defendants, and thereupon a motion was made to set aside the verdict and for a new trial. This motion was denied by the court. The case was thereupon taken by appeal to the supreme court of the Territory of Arizona. Errors of the trial court were duly assigned. The judgment of the district court was affirmed by the Territorial supreme court. Motion for a rehearing was made and denied by such supreme court. A writ of error was taken to this court, and several causes of error are duly assigned.

ARGUMENT.

Several of the assignments of error are directed to that portion of the case which relates to the character of the lands from which the timber was cut and removed, in respect to their being mineral or non-mineral lands. There is some testimony having a tendency to show that the same were mineral lands, while it would appear that the weight of the testimony and evidence strongly preponderated against such contention. The doctrine is laid down by this court in

cases brought from the Territorial courts that it *will not weigh* the testimony and evidence adduced in the trial court. We therefore do not deem it proper to discuss that subject further.

Error is also assigned because certain rules and regulations of the Secretary of the Interior as to cutting and removal of timber from the public lands were not given by the trial judge as part of his instructions to the jury, as requested by the attorneys for the United States. But a careful consideration of the point thus raised leads counsel here to the conclusion that instructions were given substantially covering the same ground as far as the act of Congress was intended to go, and as the Secretary of the Interior could not enlarge upon the terms of the act in such manner as to contract the scope of the authority for cutting sought to be granted, we think the error, if any, was not sufficiently substantial to warrant further contention.

Therefore the issue here will be narrowed down to the one proposition as to the alleged error of the courts of Arizona, first, in declining to instruct the jury to find for the plaintiff, and, later, in holding that it was unnecessary to show that Ross, the party who cut and removed the timber, was a citizen of the United States, or that there was any evidence sufficient to be submitted to the jury that he was a bona fide resident of the Territory of Arizona.

This issue was carefully raised throughout the progress of the case from the closing of the testimony on the trial to its coming into this court, and it is deemed proper that this court should be asked to pass upon the

action of the lower courts, and to construe the hereinbefore quoted section of the act in question.

As all the testimony in the case is here in the transcript of record, it is easy to find; in fact it seems to be admitted in several places in the record by both the trial court and the supreme court of the Territory of Arizona, that there was an absence of any testimony tending to show in any manner that the said Ross was a citizen of the United States; nor is it anywhere found that he was such, except it may be inferred from the general verdict for defendant.

As to the further question, whether he was a bona fide resident of the Territory of Arizona, it seems to have been conceded by the Territorial supreme court that the only testimony upon that question was contained in the deposition of said Ross, which will be found on pages 96–99 of the record. His exact language is as follows: "I moved into Rock Creek and began to cut timber there in April, 1887." His testimony further shows that he had a sawmill there, and merely indicates the manner of his conducting the operations and the manner in which he delivered the timber to the defendant company. There is no word of evidence other than as stated to indicate where he resided, where his family resided, his voting place, or any other of those circumstances from which a witness's residence may be ordinarily determined.

Therefore we assume that these requirements of the statute, in order to make the privilege of cutting available to a person, were not complied with by the defendant company in the trial of this cause.

It is true that on such trial the court, after refusing the motion of plaintiff for an instruction to the jury in their favor, did instruct the jury upon the general subject of the requirements of the statute, and it particularly called their attention to those requirements as to residence and citizenship. Such instructions may be found in the record, page 249, and are as follows:

> It is also incumbent upon the defendant, in order to avail itself of the permission granted by said act of June 3, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross at the time of the cutting and removal of said timber from the lands of the plaintiff was a citizen of the United States and was a bona fide resident of the Territory of Arizona; and should the evidence in this case fail to establish that at the time of the cutting and removal of said timber the said Daniel D. Ross was a citizen of the United States and a bona fide resident of the Territory of Arizona, you must find for the plaintiff, without regard to the mineral or nonmineral character of the land.

But it may be seen at a glance that the refusal of the court to instruct the jury for the plaintiff and the giving of the instructions as above quoted was equivalent to an assumption upon the part of the court that there *was* evidence upon these important questions which it was his duty to submit to them with such instructions. That being the case and such evidence being wanting, it may be fairly argued that the court

contributed directly to the error of the jury arrived at in their verdict.

None of the lower Federal courts have passed directly upon the points at issue except in this case; nor has this court directly considered it, so far as can be ascertained. It is, therefore, an entirely new and open question as to whether the courts below were correct or in error. The intention of the trial judge to be fair is everywhere manifest from the record. Nor can it be said that the supreme court of Arizona disposed of the issues otherwise than according to the dictates of fair reasoning. But we contend here that both were none the less in error in the conclusion arrived at.

THE ACT.

While the criticisms of this act made by Judge Deady, of Oregon, in *United States* v. *Smith* (11 Fed. R., 487), were rather too searching and severe, it is not difficult to see that those "apt and fitting terms" so desirable in legislation were in this case the exception and not the rule. Still, Congress must have had an intention, and if possible we should find it.

WERE ALIENS INTENDED TO BE BENEFICIARIES?

The purpose of Congress was to aid miners and mining companies to the necessary fuel and timber with which to prosecute their operations; but this timber was not to be taken from agricultural lands, as that might retard agricultural development, but from the mining or mineral lands. Mining operations, when not carried on by individuals, are commonly carried on by organized corporations. If an individual has

ever sought the advantages of the homestead preemption or mining laws of the United States to obtain lands therefrom, he must have been a citizen thereof, or, being an alien, he must have declared his intention to become such citizen. In fact, it has ever been the settled policy of Congress that aliens might not have equal rights with citizens in and to the public domain, unless they manifested in a legal way their intentions to become such. In this case, if it had been the purpose of Congress to bestow the very valuable license to cut and remove timber free of charge from the public domain without regard to the nationality of the operators, it was only necessary to make such innovation plain, that Congress should have left out the words "citizens of the United States and other"—and thus the section would have read "all persons bona fide residents," etc.

Who, then, could have been intended by the use of the words "and other persons"? We believe that it was those artificial persons known as companies or corporations—not foreign corporations or companies—but such as were organized and doing business under the laws of the United States, or some of the States, so as to stand in the same legal position as individual citizens thereof.

It will not be necessary to discuss this topic further at this time, as opportunity for future consideration will occur on oral argument.

BONA FIDE RESIDENTS.

The next question is, Who were intended to be considered bona fide residents? We have already seen

(argued) that parties claiming license under this act must have been citizens of the United States. But this was not all. They must have been bona fide residents of one of the States or Territories mentioned in the act, or of some mineral district where there was Government mineral land. In this case (Arizona) Ross, who cut this timber, appeared to have been engaged in the business of cutting timber and lumber. He testifies simply that he "moved in." In that connection mention is made of his sawmill, his tools, and equipments, but nothing is said of his family—if he had one—or anything else which would tend to fix his residence. Neither citizenship nor residence can be inferred or presumed from mere business operations standing alone. This man might have lived in Canada, had his family there, cast his vote there, and even done his banking there, but have cut and manufactured the trees of the United States in Arizona. Or he might have had a perfectly legal residence in Sonora, Mexico, only 10 miles to the south, or in California, a few hours' ride to the westward, or in New Mexico, a very short distance east of where this cutting and removal of the timber took place. Nor were the jury enlightened by any evidence submitted as to what was intended by Ross's statement above quoted. He does not say from what State he moved, nor to what State or Territory he came. He might have intended to imply that he came from territory other than that of Arizona, to that *mining region.*

As before stated, the place was just on the border of Mexico, and not far from New Mexico. The State of

Sonora in Mexico is well known to be almost wholly a *mining* territory or region. It is also well known that southwestern New Mexico abounds in actually developed and prospective mining lands. The regions thereabouts where mining is carried on are so vast that there is nothing whatever which serves to indicate to any degree of certainty what was intended by him to be inferred from the single expression. Moreover, the failure to ask of him the usual preliminary question as to his name, age, residence, and occupation in some measure serve to indicate that the subject of his citizenship and residence were intentionally avoided by defendant's counsel. Was it his mill, then, his tools, or his other belongings, or was it himself that moved in? Which? There are no presumptions arising from his testimony, no side lights upon the subject—especially in so much as to demonstrate him to have been a bona fide resident of Arizona.

It is plain that Congress did not intend to make this concession to an ordinary sojourner, for the term "residence" was preceded by the expression "bona fide." As a matter of strict American law the two expressions were equivalent to *undisputed domicil.*

At the earlier common law a distinction was made between the terms "residence" and "domicil," the former being a broader and more general term; but for a long time past in the legislation of this country "residence" has been the term commonly used to signify "domicil."

Residence, in American legislation, generally,

though not always, means domicil. (Jacobs on Domicil, sec. 75.)

There are a large number of cases upon this topic, embracing a very wide range of subjects, including copyright laws, judicial citizenship, settlement, taxation, voting, insolvency, limitations of action, divorce, jurisdiction, probate jurisdiction, naturalization, attachment, and homestead exemption.

These cases serve to show for almost every imaginable purpose incidental to law and legal proceedings in American legislation that residence and domicil are synonymous terms.

Under the United States copyright acts of February 3, 1831, and August 18, 1856, which provided that persons in order to avail themselves of the privileges of these acts must be citizens of the United States or residents therein, Judge Drummond in *Boucicault* v. *Wood* (2 Biss., 38), said:

> Residence ordinarily means domicile, or the continuance of a man in a place, having his home there. * * * In order to constitute residence it is necessary that a man should go to a place and take up his abode there with the intention of remaining there.

In *Abington* v. *North Bridgwater*, the supreme court of Massachusetts, in considering the question of a pauper's settlement in a township, says:

> It has been argued in behalf of respondents that residence is something different from and something less than domicile. If this be so under some circumstances, and in connection with the particular subjects or particular words which

> may tend to fix its meaning that in general residence and domicile are regarded as nearly equivalent, then there seems to be no reason for making the distinction in the present case. (23 (40) Pick., 170.)

The same court, in deciding a matter of taxation of a person as a resident and inhabitant of Boston, say, in *Thorndike* v. *Boston* (1 Met., 245):

> The questions of residence, inhabitancy, or domicile—for although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence—are attended with more difficulty than most any other.

The same court, by the same judge, Chief Justice Shaw, considering the right of a party to vote, where the statute provided that every male citizen of 21 years of age and upward, who shall have resided in the State one year and upward, etc., say:

> But the question of residence * * * may be, and often is, one of considerable difficulty. The term "resident" and "inhabitant" are equivalent. * * * Both terms indicate the place of one's home or dwelling place, which depends upon the common-law doctrine of domicile. (*Blanchard* v. *Stearns*, 5 Met., 298.)

In two other cases in insolvency, where a party was required by statute to have a residence within the State, the same court and judge reiterated the same doctrine. (*McDaniel* v. *King et al.*, 5 Cush., 473; *Collister* v. *Hailey*, 6 Gray, 518.) And this court again held, in a case resting under the statute of limitations, the same rule. (*Langdon* v. *Dowd*, 6 Allen, 425–426.)

In divorce proceedings the rule was also pursued by them. (*Shaw* v. *Shaw*, 98 Mass., 1–58.)

There are numerous other cases from that State which might be cited, but we have only given several, instead of one, because the Massachusetts rule seems to have been followed generally, and often quoted by the courts of a large number of the other States.

In Rhode Island it was held that residence in the constitution of that State means domicile, and not merely habitancy. (*State* v. *Aldrich*, 14 R. I., 171.) This was a case involving the elective franchise. In New York a large number of cases held to the same doctrine, a large number of subjects being involved. We cite but one of them. In *Kennedy* v. *Ryall* (67 N. Y., 386), the court say: "Generally speaking, residence and domicile mean the same thing."

In New Jersey the law required that a voter "hath resided in the county where he claims a vote," and it was there held that the residence required in the laws of this State to entitle a person to vote at an election means his fixed domicile, or permanent home. Exactly the same doctrine was adopted in Pennsylvania in the soldiers' vote act in 1862. "Residence" in the constitution is the same as domicil, the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights. (*Chore* v. *Miller*, 41 Penn. St., 404.) In North Carolina, "residence as used in the clause in the constitution defining political rights is synonymous with domicil, denoting a permanent dwelling place to which the party when absent intends to return." (*Harmon* v. *Grizzard*, 89 N. C., 115.)

The same doctrine is held in Florida, in *Dennis* v. *State*, where nearly all the authorities in the various States are reviewed and considered, and where a conviction of perjury was set aside for swearing in defendant's vote while he was staying in Washington as an official of the Treasury Department (17 Fla., 389).

Only one of several cases in Alabama need be cited to show that the supreme court of Alabama held to the same doctrine that residence is synonymous with domicile. (*Talmadge's admr.* v. *Talmadge*, 66 Ala., 199.)

In Illinois, residence was held in a contested election case to be the same as domicile. (*Dale* v. *Irwin*, 78 Ills., 181.) The supreme court of Michigan adopted the doctrine of Massachusetts, to the same effect that residence means the same as domicile. The subject considered was the Statute of Limitations. (*Campbell* v. *White*, 22 Mich., 196–197.) Four other States—Wisconsin, Iowa, Missouri, and Minnesota—also so held, in the following cases:

Hall v. *Hall*, 25 Wis., 600;
Hinds v. *Hinds*, 1 Iowa, 36;
Church v. *Crossman*, 49 Iowa, 447;
Chariton County v. *Moberly*, 59 Mo., 238;
Venable v. *Paulding*, 19 Minn., 488.

It seems almost certain, therefore, that the term *bona fide residents* was intended by Congress in enacting this statute to mean persons domiciled in (applying the statute to this case) Arizona.

So construing the statute, it may be perfectly proper to inquire what one of the great number of elements indicative of domicil was before the jury in the case

under consideration. It is not shown where Ross ate, slept, boarded, kept house, voted, traded, attended church, had his business office, maintained his family, if possessed of one, or whether even this was the only timber cutting and manufacturing operations he conducted. There is no evidence from which a presumption of even temporary residence can arise. The whole situation is "without form and void," like the preliminary stages of creation in Genesis.

Upon what basis, then, could the trial court venture an instruction to the jury as to bona fide residence or citizenship of the United States? To do so was not to guide the jury in passing upon the evidence in the case, but to lead them directly into error, as where the blind leads the blind; and the supreme court of the Territory fell into the same error in passing upon these two plain requisites to a successful defense against the Government's admitted prima facie case.

The court should have ordered a verdict for the United States on motion of its attorneys. Had this been done and if then and there the defense had offered to supply the necessary evidence on these two points, the court as a matter of discretion could have admitted such evidence, in which case the court's subsequent action would have been proper. But it was not done, and we, therefore, submit that the case should be reversed.

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FEBRUARY 13, 1902.

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